

The opinion in support of the decision being entered today was **not** written for publication and is **not** binding precedent of the Board.

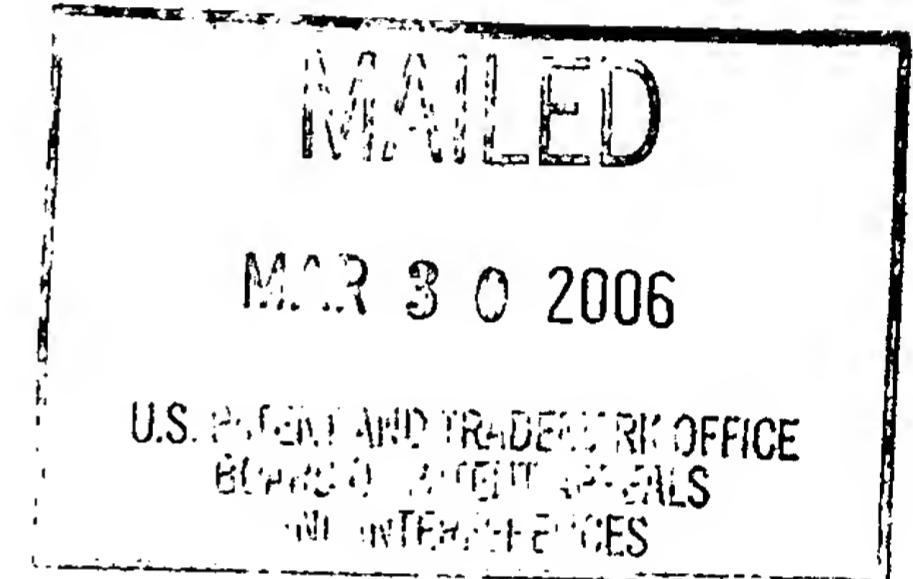
UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ROBERT STANLEY FARR and MARK NICMANIS

Appeal No. 2006-0912
Application No. 10/081,575¹

ON BRIEF



Before GARRIS, PAK, and JEFFREY T. SMITH, Administrative Patent Judges.

PAK, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal from the examiner's final rejection of claims 1 through 14. Claims 15 through 21, the only other claims pending in the present application, stand withdrawn from consideration by the examiner as being directed to a non-elected invention. We have jurisdiction pursuant to 35 U.S.C. § 134.

¹Application for patent filed Feb. 22, 2002, entitled, Effervescent beverage product and method for drinking the same.

APPEALED SUBJECT MATTER

The subject matter on appeal relates to a pressurized beverage product comprising "a container, a dispenser [(a valve)], and a pressurized beverage having a soluble and/or a sparingly soluble effervescent gas dissolved therein." See the specification, pages 1 and 3. Further details of the appealed subject matter are recited in representative claims 1, 6, 7 and 8² which are reproduced below.

1. A pressurized beverage product comprising:

(a) a beverage within a pressure resistant container, the beverage comprising a soluble gas, a sparingly soluble gas, or a mixture of gases dissolved therein; and

(b) a valve in a position to seal the container, the valve, when opened, suitable to dispense the beverage as an effervescent beverage to a mouth of a consumer wherein, internally, the container has a headspace pressurized to less than about 25 bar, gauge, with the soluble gas, sparingly soluble gas, or mixture of gases and further wherein the container does not comprise an expandable bag.

6. The pressurized beverage product according to claim 1 wherein the pressurized beverage product comprises water with less than about 0.5 ppm chlorine.

7. The pressurized beverage product according to claim 1 wherein the beverage is juice, tea, coffee, an alcoholic drink, a diet drink, a protein-based drink, soda, or a pharmaceutical or medicinal drink.

² To extent appellants provide specific reasons for the separate patentability of a claim or group of claims, we will consider these claims separately. See In re McDaniel, 293 F.3d 1379, 1382-83, 63 USPQ2d 1462, 1464 (Fed. Cir. 2002).

Appeal No. 2006-0912
Application No. 10/081,575

8. The pressurized beverage product according to claim 7
wherein the beverage is a citrus beverage.

REFERENCES

The prior art references relied upon by the examiner are:

Ash	3,063,841	Nov. 13, 1962
Atkins et al. (Atkins)	3,917,867	Nov. 4, 1975
de la Guardia (Guardia)	5,738,254	Apr. 14, 1998

REJECTIONS

The appealed claims stand rejected as follows:

- (1) Claims 1, 2, 5, 7, 10, 11, 12 and 14 under 35 U.S.C. § 102(b) as anticipated by the disclosure of Ash;
- (2) Claims 1 through 4, 11, 13 and 14 under 35 U.S.C. § 102(b) as anticipated by the disclosure of Guardia;
- (3) Claim 6 under 35 U.S.C. § 103(a) as unpatentable over the disclosure of Guardia; and
- (4) Claims 8 and 9 under 35 U.S.C. § 103(a) as unpatentable over the combined disclosures of Guardia and Atkins.

OPINION

We have carefully reviewed the claims, specification and applied prior art, including all of the arguments advanced by the examiner and the appellants in support of their respective positions. This review has led us to conclude the examiner's Sections 102(b) and 103(a) rejections are well founded. Accordingly, we affirm the examiner's rejections for essentially the findings of fact and conclusions set forth in the Answer. We add the following primarily for emphasis and completeness.

ANTICIPATION

Under Section 102(b), "anticipation" is established only when a single prior art reference discloses, either expressly or under the principles of inherency, each and every element of a claimed invention. In re Spada, 911 F.2d 705, 708, 15 USPQ2d 1655, 1657 (Fed. Cir. 1990); RCA Corp. v. Applied Digital Data Systems, Inc., 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed. Cir. 1984). The law of anticipation, however, does not require that the prior art reference teach the purpose contemplated by the appellants in the specification. Kalman v. Kimberly-Clark Corp., 713 F.2d 760, 772, 218 USPQ 781, 789 (Fed. Cir. 1983). Rather, it only requires that the claims on appeal "read on" something

disclosed in the prior art reference. Kimberly-Clark Corp., 713 F.2d at 772, 218 USPQ at 789.

With the above precedents in mind, we turn to the examiner's Section 102(b) rejections. We observe that the examiner has found, and the appellants have not disputed, that Ash and Guardia individually teach a pressurized beverage product corresponding to the one recited in claim 1, except for a dispenser defined by the claimed functional limitation. Compare the Answer in its entirety with the Brief in its entirety. Indeed, the appellants assert (e.g., the Brief, pages 12 and 14) that:

There is no teaching whatsoever in the '841 reference [Ash] that suggests that the method of dispensing is geared towards dispensing and effervescent beverage directly into the mouth of a consumer as claimed in the present invention. The '841 reference [Ash] discloses a dispensing apparatus that is similar to a faucet in a conventional household sink, all of which is attached to a cask or barrel. Taking a drink directly from a household sink would be equivalent to taking a drink directly from the apparatus described in the '841 reference [Ash].

...
...Clearly, there is no teaching whatsoever in the '254 reference [Guardia] that even remotely suggests a pressurized beverage product that is suitable to be dispensed as an effervescent beverage³ into the mouth

³ According to page 4 of the specification, “[e]ffervescent beverage, as used herein, is defined to mean a beverage capable of emitting small bubbles of a gas...” Thus, the term “effervescent beverage,” as used in the claims on appeal, includes the carbonate beverage discussed in Guardia and the beverage, e.g., beer, containing gas in solution discussed in Ash. See the specification, pages 5, 6 and 8 for beverages capable of emitting small bubbles of a gas.

of a consumer as set forth in the presently claimed invention. ... The device in the '254 reference is "fire-extinguisher" like and not even remotely designed to dispense beverage into the mouth of a consumer.

Thus, the dispositive question is whether the claimed functionally defined dispenser would have rendered the claimed pressurized beverage product structurally different from those described in the prior art references. On this record, we answer this question in the negative.

As our reviewing court stated in In re Schreiber, 128 F.3d 1473, 1478, 44 USPQ2d 1429, 1432 (Fed. Cir. 1997):

A patent applicant is free to recite features of an apparatus either structurally or functionally. See In re Swinehart, 439 F.2d 210, 212, 169 USPQ 226, 228 (CCPA 1971) ("[T]here is nothing intrinsically wrong with [defining something by what it does rather than what it is] in drafting patent claims."). Yet, choosing to define an element functionally, i.e., by what it does, carries with it a risk. As our predecessor court stated in Swinehart, 439 F.2d at 213, 169 USPQ at 228:

where the patent Office has reason to believe that a functional limitation asserted to be critical for establishing novelty in the claimed subject matter may, in fact, be an inherent characteristic of the prior art, it possesses the authority to require the applicant to prove that the subject matter shown to be in the prior art does not possess the characteristic relied on.

Here, the examiner has reason to believe that the prior art pressurized beverage product dispenser is capable of performing the claimed function. See the Answer, pages 6-8. The examiner has found and/or taken official notice (the Answer, pages 6-8) that:

Ash's valve sealed to the container is "suitable to dispense the beverage as an effervescent beverage to a mouth of a consumer" because it was **notoriously well known** that beer taps [such as that shown in Ash] have been used to dispense beer directly into the mouth of a consumer. Furthermore, even facets in a household sink, contrary to Appellants['] belief[, is] "suitable to dispense...to a mouth of a consumer" because faucets have been used to dispense water into the mouth of a consumer.

...
[Guardia's] valve would be capable of dispensing [a carbonated beverage] into a consumer's mouth, because...Guardia teach[es] [that] the containers are 2 or 3 liter carbonated beverage containers and [that] the valve for dispensing [the same], as shown in Figure 4, has a similarly sized outlet as the bottle outlet. Carbonated beverage containers that are 2 or 3 liters in size were **known** [to] have outlets suitable to dispense a beverage into the mouth of a consumer.

[Emphasis added.]

The appellants have not challenged this finding and/or official notice taken by the examiner. Compare the Answer, pages 6-8 with the Brief in its entirety. Thus, we concur with the examiner that the claimed functionally defined dispenser encompasses those structures shown in Ash or Guardia. On this record, the appellants have not demonstrated that the dispensers of the type

Appeal No. 2006-0912
Application No. 10/081,575

described in Ash or Guardia are not capable of dispensing effervescent beverages to a consumer's mouth. In re Yanush, 477 F.2d 958, 959, 177 USPQ 705, 706 (CCPA 1973); In re Casey, 370 F.2d 576, 580, 152 USPQ 235, 238 (CCPA 1967); In re Otto, 312 F.2d 937, 939, 136 USPQ 458, 459 (CCPA 1963).

Thus, for the reasons set forth in the Answer and above, we concur with the examiner that the prior art relied upon by the examiner would have rendered the subject matter defined by claims 1 through 5, 7 and 10 through 14 anticipated within the meaning of 35 U.S.C. § 102(b).

OBVIOUSNESS

Under Section 103, the obviousness of an invention cannot be established by combining the teachings of the prior art references absent some teaching, suggestion or incentive supporting the combination. ACS Hospital Systems, Inc. v. Montefiore Hospital, 732 F.2d 1572, 1577, 221 USPQ 929, 933 (Fed. Cir. 1984). This does not mean that the prior art references must specifically suggest making the combination. B.F. Goodrich Co. v. Aircraft Braking Systems Corp., 72 F.3d 1577, 1582, 37 USPQ2d 1314, 1318 (Fed. Cir. 1996); In re Nilssen, 851 F.2d 1401, 1403, 7 USPQ2d 1500, 1502 (Fed. Cir. 1988). Rather, the test for

obviousness is what the combined teachings of the prior art references would have suggested to those of ordinary skill in the art. In re Young, 927 F.2d 588, 591, 18 USPQ2d 1089, 1091 (Fed. Cir. 1991); In re Keller, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981). This test requires us to take into account not only the specific teachings of the prior art references, but also any inferences which one skilled in the art would reasonably be expected to draw therefrom. In re Preda, 401 F.2d 825, 826, 159 USPQ 342, 344 (CCPA 1968).

With the above precedents in mind, we turn to the examiner's Section 103(a) rejections. We observe that the appellants have not challenged the examiner's determination that:

[I]t would have been obvious to remove the chlorine to less than 0.5 ppm prior to filing the container of... Guardia since this is a conventional method for improving the flavor of a carbonated beverage.

...

[I]t would have been obvious to modify...Guardia and select a carbonated pulp-free orange juice since Atkins et al teach [that] a pulp free orange juice provides an exceptionally good quality, good storage ability, and a pleasantly flavored bottled carbonated orange juice.

The appellants only argue that the prior art references do not teach or suggest the claimed functionally defined dispenser. See the Brief, pages 15-16. Thus, for the reasons set forth above and the Answer, we concur with the examiner that the prior art

Appeal No. 2006-0912
Application No. 10/081,575

references would have rendered the subject matter defined by the claims 6, 8 and 9 obvious to one of ordinary skill in the art within the meaning of 35 U.S.C. § 103.

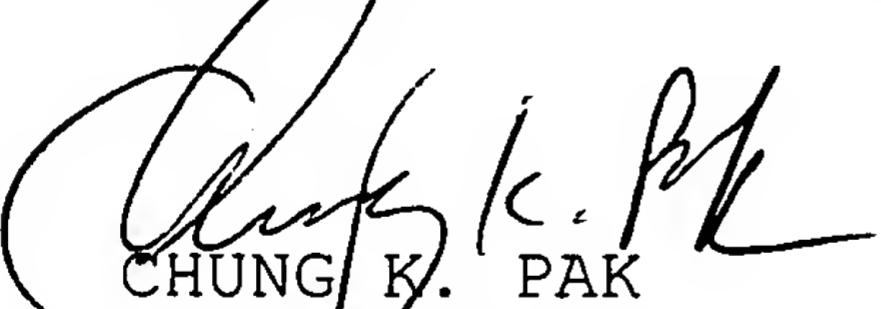
CONCLUSION

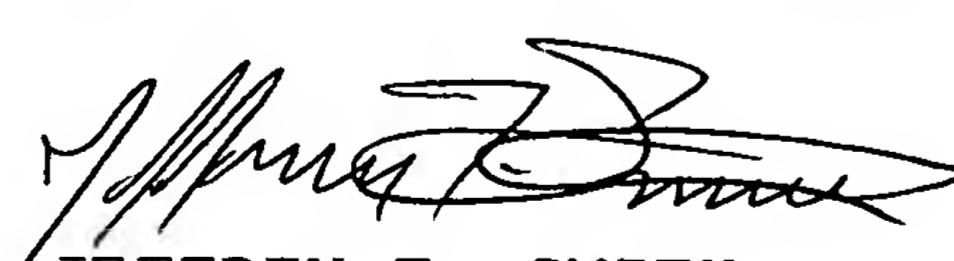
For the reasons set forth in the Answer and above, we affirm the examiner's decision rejecting the claims on appeal under Sections 102(b) and 103(a).

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED


BRADLEY R. GARRIS)
Administrative Patent Judge)


CHUNG K. PAK)
Administrative Patent Judge)


JEFFREY T. SMITH)
Administrative Patent Judge)

BOARD OF PATENT
APPEALS AND
INTERFERENCES

CKP:rwk

Appeal No. 2006-0912
Application No. 10/081,575

UNILEVER INTELLECTUAL PROPERTY GROUP
700 SYLVAN AVENUE,
BLDG C2 SOUTH
ENGLEWOOD CLIFFS, NJ 07632-3100